IN THE

Supreme Court of the United States

October Term, 1946

A. M. ANDERSON, Receiver,

Petitioner,

v.

LAWRENCE S. HELMERS, et al.,

Respondents.

No. 656

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Respondents assert that vitally important facts were omitted in Petitioner's statement of the case.

1. The substance of the notice to Banco shareholders was set forth in Petitioner's Brief. Respondents ignore the language of that notice, as an entire communication, as well as its obvious intent, and stress only "payable at the Office of the Receiver." The words were not in the Comptroller's order at all and were not authorized by either the National Bank Act or the Comptroller's directions to the Receiver. These few words represent the thread upon which Respondents' case hangs.

Neither notice of the assessment nor demand for its payment are necessary preliminaries to suit to collect a na-

tional bank stock assessment. Respondents apparently accept that as the law, for no comment is made on the cases so holding, discussed on page 12 of Petitioner's Brief. Nor is there any comment made on the holding in *Fisher* v. *Whiton*, 317 U. S. 217, that a national bank receiver's demand for payment, before the expiration of the grace period allowed by the Comptroller, is premature and unauthorized by law. It is difficult to understand how a suggestion volunteered by the Receiver, even though it be assumed to have been a demand on *Banco* shareholders to pay in Kentucky, could have resulted in the imposition of some new duty on Respondents. Not only was that notice premature, as a demand, but it indicated that the amounts holding company shareholders would be expected to pay would be unknown until a deficiency on Banco's liability had been established.

2. The assessment order is quoted in full, with emphasis on the word "requisition" and on the recitation that the Comptroller thereby made "demand" upon shareholders of the National Bank of Kentucky. Respondents were not holders of shares of stock issued by the bank. The notice advised them the Receiver would seek from them the "liability represented by the said trustees' participation certificates held by said BancoKentucky Company," to the extent he was unable to recover from Banco.

Section 191 of the National Bank Act (Title 12 U. S. C. § 191) requires a receiver, in mandatory language, to "enforce" shareholders' liability. The only way that may be done is by suit. Respondents do not deny that the Comptroller had the power, upon deciding that an assessment was necessary and fixing its amount, to direct the Receiver to proceed immediately by suit to enforce claims. Of what consequence then a demand by the Comptroller to pay at a future time? No present compliance was suggested.

The word "requisition" in the assessment order is defined by Respondents as "an authoritative demand." The inference seems to be that by describing the word as "authoritative," it thereby becomes lawful. The same source from which Respondents quote the definition contains this sentence:

"Law. A formal demand for the performance of an obligation, esp. one made through a notary."

The liability of a tort feasor certainly is not affected by a demand for damages. The liability of the maker of a note, who has himself promised and agreed to perform at a certain time or place, is unaffected by the holder's "demand" that he perform his agreement.

McDonald v. *Thompson*, 184 U. S. 71, 76, is said to present similar procedure, where similar language was held to be a demand for payment. That case held that the statute of limitations began to run against the receiver on the date fixed by the Comptroller. The receiver could not toll the statute by merely neglecting to demand payment. The language to which Respondents refer was merely the court's comment on the obviously unfounded argument of the receiver,—that the statute did not begin to run against him until he made demand.

3. The stipulation as to the place of the bank's operations, Kentucky, is conceded by Respondents to be merely the recitation of an express provision of the National Bank Act. It adds nothing whatever to this case.

SUMMARY OF RESPONDENTS' ARGUMENT

The decision of the court below is said to be correct for the following reasons:

(1) The limitations law of the forum applies. That has never been disputed, as Respondents discover, at page 23 of their Brief.

The limitations law of the forum applies though the cause of action be asserted on the equity side of the court. That has never been disputed.

(2) The Ohio borrowing statute adopts the period of limitations of the jurisdiction "where the cause of action arose." This has never been disputed.

(3) Respondents insist the lower court was correct in holding the cause of action arose in the state of Kentucky because (a) that was the place for Respondents' performance, and (b) all the operative facts which gave rise to the cause of action occurred in Kentucky. Respondents ignore completely that the claim against them arose out of the fact of their ownership of stock of a Delaware corporation, plus the legal consequence of liability under national law.

(4) The Kentucky period of limitations, controlling actions in Kentucky, is five years, a lesser period than Ohio's six-year period. If this action were in Kentucky, the period of limitations would not be tolled because Respondents were always residents of Ohio. There is no dispute about this section of Respondents' brief, except the assertion that the Ohio borrowing statute applies.

(5) The suit here was commenced more than five years, but less than six years, after it accrued. There is no controversy over when the cause of action accrued. *Rawlings* v. *Ray*, 312 U. S. 96, held that the time when a receiver's cause of action accrues is a question of substantive federal law. The court approved its earlier decision in *Pufahl* v. *Estate of Parks*, 299 U. S. 217:

> "that the non-discriminatory legislation of Illinois where the suit was brought was controlling. We observed that the contingent *obligation* of a stockholder to pay an assessment was rendered *absolute* by the Comptroller's action in ordering one and that from

> the *moment* of the order of assessment the receiver had a claim which would support *an action* at common law against a living stockholder. . . ."*

The question for decision in *Rawlings* v. *Ray* was "as to the *time when* there was a complete and present cause of action so that the receiver could enforce by suit the liability imposed" by federal law. The state or country where Petitioner's cause of action arose is equally a matter of substantive federal law.

"MISCONCEPTIONS INVOLVED IN PETITIONER'S ARGUMENT"

1. Petitioner is charged with confusing the term "liability" with "cause of action." What is the difference in connection with the question of where the cause of action arises? There is a difference when the question is *when* a cause of action has matured to a present right to sue. But where a cause of action "arose" requires consideration of the inception of the liability asserted, before its maturity as a complete cause of action. It is said that the federal law did not create the cause of action here any more than the execution of a note creates a cause of action before default in payment. The short answer to this point is that Respondents confuse the "time when" a cause of action accrues, with "place where" it arises. When a maker or endorser executes and delivers a promissory note the place where a cause of action may arise becomes a closed subject. So far as the maker is concerned, any cause of action asserted against him arises where he agreed it should. The "where" concerns applicable law, not geography.

The court below assumed there was an important distinction between a "liability" and a "cause of action." It

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* All emphasis Petitioner's, unless otherwise noted.

said the "cause of action came into existence by reason of the failure of the defendants to pay the assessment at the time and place provided. A failure to perform a legal duty at the time required is equivalent in the present case to an affirmative act (R. 49)." Failure to perform a legal duty may be the equivalent, in the sense of accruing a cause of action, but it is not the equivalent in the sense of *where* the cause arose.

The fundamental dispute in this case is disclosed by Respondents' contention that the Ohio borrowing act "does not borrow as Petitioner seems to assume, the limitations of the jurisdiction whose laws created the liability. As far as that statute is concerned, it is immaterial under what *law* the liability was *created* or whether it was created by law or by contract. The statute borrows only the applicable period of limitations of the state "where the cause of action arose.'" Respondents stress only geography. The jurisdiction in which a cause of action arises depends on which political entity is sovereign in the field, the state or the United States.

2. Petitioner has never contended that the order of assessment "matured" the cause of action so as to immediately permit suit. Respondents still confuse time with place. The lapse of time between the Comptroller's determination that an assessment was necessary, until the expiration of the grace period he allowed, has no bearing on the nature or essentials of Petitioner's cause.

As Dean (now Judge) Clark has said:

> "The cause of action under the record should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons." Clark: The Court Cause of Action (1924), 33 Ill. L. J. 817.

The language of *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 223:

> "From the moment of the Comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law"

was approved in *Rawlings* v. *Ray*, 312 U. S. 96, 99. In the *Pufahl* case the shareholder never had an opportunity to fail to pay. He died three years before the insolvency of the bank and the assessment. When his liability matured to an enforcible debt, by the Comptroller's order, it was enforcible against the executor as an obligation of the decedent. *Fisher* v. *Whiton* considered only when a receiver's cause of action matured to a right to sue. It limited in no way the earlier pronouncement as to what the cause of action was. The Court was considering not cause of action as the aggregate of operative facts. The Comptroller's order of assessment usually restrains the receiver's assertion of the absolute cause of action by postponing the right to sue. Respondents' statement—"Hence not merely the assessment but failure to pay the assessment is necessary to ripen the liability into a cause of action"—is an attempt to improve upon the above decisions of this Court, by the addition of "failure to pay" to mere lapse of time after the Comptroller's order.

3. Respondents' comment on the undeniable fact, that non-payment is here as an hypothetical operative fact and not part of the cause of action asserted, is:

> "But, in an action on an obligation for the payment of money, non-payment is universally held to be an essential part of the cause of action that must be alleged in the complaint. 48 C. J. 665, Sec. 129."

The cited text is as follows:

> "Non-payment need not be alleged in the petition, declaration, or complaint, except where failure to pay

> must be stated as an essential element of the cause of action, as for example, in an action on a contract, the breach of which consists of non-payment, although such an allegation is not improper."

To the same effect, 40 Am. Jur. Payment, Sec. 226, page 867, and authorities cited at page 14 of Petitioner's Brief.

Non-payment is not only "universally" held to be an essential part of a cause of action, but that is also true, say Respondents, in those jurisdictions where payment is an affirmative defense, citing *Lent v. Ry. Co.*, 130 N. Y. 504, 510, 29 N. E. 988 (1892). There, property owners sued to recover an award in railroad condemnation proceedings, asserting a right under New York statutes. The New York statute permitted such suit only after the recording of the order of award and after the railroad had neglected to make payment or the deposit required as a condition precedent to passage of title to it. The railroad company's obligation was conditioned upon its neglect or failure to pay, and that non-performance was, of course, an essential element of a landowner's cause of action.

New York is in accord with the general rule to which reference was made at page 14 of Petitioner's Brief. One of the New York cases cited in 100 A. L. R. 275, should be sufficient. It held that the allegation that rent became due and payable, was a mere conclusion of law, not of fact, and a general denial of all allegations, including non-payment, was not sufficient to permit proof of payment. *Fuller Co. v. Manhattan Const. Co.*, 88 N. Y. S. 1049 (1904).

Attention is directed to the words "due from each stockholder." That is represented to be the equivalent to an allegation of non-payment, citing 8 Am. Jur. p. 565, Sec. 957. That text is as follows:

> "As a matter of pleading it is necessary for the plaintiff in an action on a bill or note to allege the non-

payment thereof, although it is not necessary for him to support such allegations by any proof other than that which is necessarily atten 'ant on the introduction of the note in evidence or its proof in case the note or bill has been lost or destroyed."

In the latter event, the holder of a note "is obliged only to prove the note, leaving the burden on the defendant to establish payment where such is his defense." 8 Am. Jur., Bills and Notes, p. 619, Sec. 1036.

4. Petitioner's contention that the United States is a "country," within the meaning of the Ohio borrowing act, is answered with an argument which leads to the conclusion that there is no such country, that the United States is merely the collective name of the states. Following the reasoning of the court below, respondents say it is inconceivable that a cause of action can arise in the United States. It can only arise in some state.

Respondents urge the theory of the court below, that a critical act within the geographical limits of the United States must necessarily occur within the geographical limits of one of the states composing it. Geographically, the statement is perfectly correct. An act within the United States must also occur between a parallel of latitude and a meridian of longitude, within some group of states, on one side or the other of the Mason-Dixon Line, within the boundaries of some township within the area serviced by West Publishing Company's National Reporter System. Of what significance are such markers? It is law which fixes the legal consequences of transactions. Usually, obligations arise by reason of the law of the state where the acts constituting the transaction occur. "Except for the very limited obligations created by Congress, e.g. *Holmberg* v. *Armbrecht*, 327 U. S. 392, a debt is not brought into being by federal law." *Vanston Bond Holders Committee* v. *Green*, 15 U. S. L. W. 4063, 4066 (Dec. 9, 1946).

There are numerous instances where acts, critical events, or operative facts, occur within the geographical limits of a state, but their consequence is wholly a matter of the supreme law of the land. Under the reasoning of Respondents and the court below, a cause of action for wrongful death occurring within the boundaries of the state of Washington would arise there, but such a death in the Puget Sound Navy Yard did not arise in the state because federal law governed. *Murray* v. *Gerrich*, 291 U. S. 315. See also *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 530; *Arlington Hotel* v. *Fant*, 278 U. S. 439.

Respondents imply that "the United States" is only a political entity in the field of international law; that in "domestic law the United States is 'the collective name of the states which are united by and under the Constitution,'" citing *Hooven* v. *Evatt*, 324 U. S. 652, 672, and Langdell, The Status of our New Territories, 12 Harv. L. R. 365, 371 (1899).

The context in which "United States" was used in the *Hooven* case, is as follows:

> "The relation of the Philippines to the United States, taken as the collective name of the states which are united by and under the Constitution, is in many respects different from the status of those areas which, when the Constitution was adopted, were brought under the control of Congress and which were ultimately organized into states of the United States."

The term as used in the Constitution—"laws of the United States"—"citizen of the United States"—is not used in the sense claimed by Respondents. Professor Langdell has this to say (12 Harv. L. R. 374):

> "It seems also to be used in the same sense in the phrase, 'citizen of the United States;' for it is only as

a unit, a body politic, and a sovereign, that the United States can have citizens,—not as the collective name of forty-five States."

The state of Rhode Island also thought the statutes of the United States were the laws of a government "foreign" in the international sense. It refused to enforce an overcharged buyer's rights under the Emergency Price Control Act on the theory that the federal statute was penal and that it was not obliged to enforce the penal laws of a government which was foreign in the international sense. This Court, in *Testa* v. *Katt*, 15 U. S. L. W. 4351 (March 10, 1947), assumed that the federal law was penal in every sense but found the reasons given by the Rhode Island court for declining to enforce it not "a valid excuse." The federal law is the prevailing policy in every state of the United States.

Respondents, in seeking the meaning of the Ohio borrowing statute—"any state or country"—claim that the word "country" was intended to refer only to "foreign" countries. How the words "any country" can be said to exclude our country, is not the result of interpretation. The insertion of a word foreign to the statute is sought to be rationalized by the argument that it can not be assumed the Ohio legislature intended the statute to be a vain thing; since there is no general federal statute of limitations to be borrowed, to consider our country as a "country," would strike down the defense of the borrowing statute; the Ohio legislature could not have intended such a vain result. Ohio has a general statute of limitations of six years, which the legislature apparently believed wholly adequate protection to Respondents. Clearly the legislature did not intend the limitations law of some other sovereign to be borrowed in every case where the cause of action did not arise by virtue of Ohio substantive

law. Where a cause of action admittedly arises in another jurisdiction, Ohio does not borrow the limitations law of such jurisdiction. It does so only "if" that period is shorter than Ohio's. If that period is longer than Ohio's, the borrowing act is as vain as it is in the present case.

Respondents' interpretation of "any country" as meaning only some "foreign" country, is thought to be supported by the interpretation of a Missouri statute referring to corporations organized under the laws of "any *other* state, territory or country." Obviously, "other country" excludes the United States.

"A CAUSE OF ACTION ARISES AT THE PLACE WHERE THE OPERATIVE FACTS OCCUR. IN THE CASE OF AN OBLIGATION TO PAY MONEY, IT ARISES AT THE PLACE FIXED FOR PAYMENT"

The above heading is misleading in its connotation of "place where" as being a matter of geography rather than law. It also assumes that either the federal law or some imaginary contract required performance by Respondents at some particular place.

Respondents say "where the obligation is solely for the payment of money, the cause of action is held to arise at the place fixed for payment—non-payment being the operative fact that finally matures the cause of action." Except where a contract is anticipatorily breached, a cause of action on a contract does arise at the place fixed for performance. That is exactly what the parties have agreed. Non-payment may or may not be an operative fact. It is only so when it is an essential element of a plaintiff's cause of action. But in any event, non-payment, if the cause of action is for breach of contract, does nothing more than Respondents claim for it. It "finally *matures* the cause of action."

Accepting Respondents' premise that "where the cause of action arose" has acquired a well recognized meaning, the authorities cited have no bearing on the problem at hand (see footnote on p. 14).

In *West* v. *Theis*, 15 Idaho 167, 96 P. 937 (1908), the debtor executed a promissory note in the state of Kansas and "agreed to pay the same within a specified time and place within the state." Of course the cause of action arose in Kansas.

The definition of a cause of action given by the court below—the combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf—is cited. What judicial interference did the law or the courts of Kentucky afford Petitioner? Kentucky could not legislate on the subject of the cause of action. Petitioner could not have invoked judicial interference of Kentucky courts because Respondents were residents of Ohio. The same quotation indicates the error of the lower court in its reasoning that the happening of the last operative fact brings a cause of action into existence. "Such an act, or the failure to act where there is a duty to do so, is the critical event which transforms a potential liability into one presently enforcible. See *Brown* v. *O'Keefe*, 300 U. S. 598, 603." The court below was under the misapprehension that the maturity or accrual of a cause of action determines where it arises. In *Brown* v. *O'Keefe*, this Court did not say that failure to pay was an operative fact. "Liquidation coupled with insolvency is the critical event which is capable of transforming a potential liability into one *presently enforcible*. . . ."

It is true that many courts hold that a defendant's residence has no bearing on the place where the cause of action against him arises. Practically all of the states have borrowing statutes and their terminology varies widely. Many

states recognize that it is unfair and unreasonable to give a resident the benefit of the shorter period of limitations of another state when he was never subject to suit there. Despite the hopeless conflict in the various state court decisions, interpreting differing statutes, the following text appeals to reason:

> "All of the foregoing principles are subject to the indispensable preliminary factor that a statute admitting the bar of another state should not be held to supply a defense if in fact the courts of such other state have not been in a position to afford relief." 11 Am. Jur. Conflict of Laws, p. , Sec. 197.

The cases cited at the bottom of page 11 and page 12 of Respondents' Brief all involved state created rights. The causes of action for breach of contract arose in a state either because the parties had agreed performance was required there, or because the agreement was anticipatorily breached there. *Payne* v. *Kirschwehn*, 141 O. S. 384, 48 N. E. (2d) 224 (1943), arose over a promissory note executed and payable in Florida. In *Anglo-American Land Co.* v. *Lombard*, 132 Fed. 721 (C. C. A. 8, 1904), the court refused to borrow the period of limitations of another state. The Kansas borrowing statute was limited to causes of action between non-residents of that state. Residents of Kansas had the benefit only of their general period of limitations. *Klotz* v. *Angelo*, 220 N. Y. 347, 116 N. E. 224 (1917), was a tort case arising due to false representations made in Missouri. *McKee* v. *Dodd*, 152 Cal. 637, 93 P. 854, was a promissory note case, the note being payable at a particular place. *B. & O. R. R. Co.* v. *Reed*, 223 Fed. 689 (C. C. A. 6, 1915), was a tort case. The Ohio District Court borrowed the Indiana statute of limitations in an action for damages for personal injuries sustained in Indiana, and commented on the fact that the plaintiff could have at all times sued the railroad company in Indiana. *Hilliard* v. *Penna. R. R. Co.*, 73 F. (2) 473 (C. C. A. 6, 1934), was a tort case, identical in principle with *B. & O. R. R.* v. *Reed*. *Anglaize Box Board Co.* v. *Kansas City Fibre Box Co.*, 35 F. (2d) 822 (C. C. A. 6, 1929), was a contract case. The contract was anticipatorily breached in Kansas. The Kansas period of limitations was borrowed under the Ohio statute. The buyer's place of business was in Kansas City and it had always been suable there. *Pond Creek Mill and Elevator Co.* v. *Clark*, 270 Fed. 482 (C. C. A. 7, 1920) was an action for breach of contract. The breach occurred in Oklahoma and the cause of action arose there. While suit was in Illinois, the defendant was a resident of Oklahoma. The limitations period of that state was borrowed. Defendant was amenable to action in that state. *Weaver* v. *Cusrin Co.*, 206 N. Y. 506, 100 N. E. 488 (1912) was a case of anticipatory breach of contract. The contract was performable in Argentina, but the breach occurred in New York, so the cause of action arose there. The question was one of jurisdiction depending upon whether the breach occurred in New York. (Continued on p. 15.)

Respondents assert that the same rule applicable to state created contract and tort rights, applies to federally created rights. In *Seaboard Terminals Corp.* v. *Standard Oil Co.*, 59 F. Supp. 91, 104 Fed. (2d) 569 (C. C. A. 2, 1939), it was held that a cause of action under the federal antitrust laws arose in Maryland as to the *two defendants who were subject to suit there*. The business of the plaintiff, a Maryland corporation, was injured by defendant's practices in Maryland. The New York District Court borrowed the Maryland statute of limitations. As to Socony-Vacuum Company, there was no such borrowing because it did not appear that it was subject to suit in Maryland. Only the New York general statute of limitations was applicable to that defendant. The New York borrowing statute was interpreted differently from Ohio's because the courts in New York would not borrow the limitations period of a state where the defendant was not subject to suit.

Respondents next cite *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (C. C. A. 3, 1917). That also was an action

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Payne v. *Kirschwehn*, *supra*, is discussed at some length by Respondents as an excellent example of the principle that a cause of action arises at the place where payment should have been made. The case would be pertinent here if the liability sought to be enforced arose by virtue of Respondents' promise to pay in Louisville. The only contract which Respondents ever made concerning assessment liability was that appearing in their stock certificates, a contract between themselves and their holding company, in which they agreed Respondents should not be subject to liability. As the dissent in *Anderson* v. *Abbott* said (321 U. S. 349, 372):

> "These stockholders cannot be said in any way to have assumed any express or implied contractual assessment liability."

McKee v. *Dodd*, *supra*, a suit on a note payable in New York State, is quoted by Respondents, emphasizing the language of the opinion which stated that it was the duty of the maker to pay the note not only when it became due, but at the place he had agreed to pay it. True, the court said: "His failure in this regard gave rise to the cause of action, and clearly, therefore, that cause of action arose in the state of New York," but the court was not precise in the use of the words "gave rise." The cause of action arose in New York because the maker promised to pay there. The state in which the cause of action might later arise was fixed on the moment the note was executed and delivered.

for damages under the Sherman Act. The damage occurred in Louisiana. Suit was filed in Pennsylvania for the expressed purpose of avoiding the shorter Louisiana statute. Where the cause of action arose was not decided. The Court of Appeals affirmed the District Court's decision which found only the general statute of limitations of Pennsylvania applicable.

Next cited is *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364 (D. C. N. Y. 1939). The operative facts there consisted of damages sustained by the plaintiff, a Montana corporation, in that state. The court commented on the fact that, under the Clayton Act, the tort feasor was subject to suit in Montana. The distinctions between liability under the National Bank Act and liability for damages under the Antitrust Act is that in the latter case, suit may be instituted either in the district of the wrongdoer's residence or where its business activities result in the damage (Title 15, U. S. C., Sec. 22). And the federal antitrust laws do not preempt that field. State laws may regulate the same conduct. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253. There is no state law on the substantive rights involved in Petitioner's cause of action and there could be none. The field occupied by the federal instrumentality of national banks excludes state interference. Petitioner had no alternative to select either Kentucky or Ohio as the forum for suit. Had suit been possible in Kentucky, there would be some reason for applying the adjective law of that state.

Causes of action under the Fair Labor Standards Act are held to arise in the state where the contract of employment was performed, as was held in *Smith* v. *Continental Oil Co.*, 59 F. Supp. 91 (D. C. N. Y. 1945). But why? Respondents neglect to give the answer. State laws are applicable because causes of action asserted under that federal Act are based upon contracts of employment which are properly within the sphere of state law. In the *Smith* case,

the contract of employment was made and performed in Oklahoma. The New York court held the cause of action arose there. The employee chose New York as the forum for suit, rather than Oklahoma, because he had permitted the latter state's period of limitations to expire. The court noted that the defendant could have been sued in Oklahoma. The only effect of federal law was to expand the terms of an express contract. The parties to such contracts necessarily enter them with those terms in mind. It is exactly that kind of right-duty relationship this Court had under consideration in *Vanston Bond Holders* v. *Green*, supra, where, after carefully excluding obligations arising under federal law, it said that "obligations exist or do not exist by force of state law. . . ." The Fair Labor Standards Act merely extends the terms of private contracts of employment. See *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583; *Rigopoulos* v. *Kervan*, 53 F. Supp. 829 (D. C. N. Y. 1943); *Northwest Yeast Co.* v. *Broutin*, 133 F. (2d) 628 (C. C. A. 6, 1943); *Keen* v. *Mid-Continent Petroleum Corp.*, 58 F. Supp. 915 (D. C. Iowa, 1945).

"THIS CAUSE OF ACTION AROSE IN KENTUCKY"

(a) How the Cause of Action Arose.

The discussion under this subsection of Respondents' Brief concerns *when* suit is permissible by a national bank receiver. Of course, the National Bank Act does not create the cause of action. It merely establishes the law. The liability attaches upon a person's assuming the status of a shareholder by acquiring ownership of bank stock. His liability is no more potential than that of an endorser, a surety, a guarantor, or any other obligor on a contingent obligation. Failure of the bank is a step in the maturity of the shareholder's liability. His *liability* is not a "latent possibility"; it is only the occasion for his responding to

it that is potential or a mere possibility prior to the failure of the bank.

Respondents say that even after the Comptroller's order of assessment "the liability has not ripened into a cause of action." It has not ripened in the sense that the Receiver is permitted to bring suit, but where the cause of action arose, had theretofore been settled.

It is no more permissible to argue that—"Should a shareholder pay the assessment before the payment date, no cause of action would arise against him,"—than to say but for the shareholder's ownership of stock he would never be sued and that therefore, the only operative fact of significance is the time and place of his acquiring such ownership. The hypothesis—if a shareholder pays—is not in this case. No Respondent has alleged his payment and the Bill of Complaint does not mention it. Respondents may inject the subject of payment into this case only if their motions to dismiss are overruled and they wish to plead and prove such a defense.

(b) "The Assessment Was Payable in Kentucky."

It is claimed that even though the Receiver had not "directed" payment by shareholders of the bank and Banco in Kentucky, the assessment would have been payable there in any event under the familiar rule that where no place of payment is specified, it is the duty of the debtor to seek out the creditor and the obligation is payable at the creditor's place of business. The authority for that statement is 48 C. J. 592, 593 (Sec. 8). That text is as follows:

> "As a general rule, in the absence of any agreement or stipulation to the contrary, a debt is payable at the place where the creditor resides, or his place of business, if he has one, or wherever else he may be found; and it is ordinarily the duty of a debtor to seek the creditor for the purpose of making payment, *provided the creditor is within the state of his residence when payment is due, unless otherwise provided by statute.*"

The cases cited have to do with state created rights. As to them, there is no duty on the debtor to go outside the state of his residence to seek out his creditor.

Though it is said that, as a practical matter, Respondents had no other place to pay except Louisville, the practical answer is—that the place where they could pay was never of any concern to Respondents. As the Third Circuit Court of Appeals indicated in the *Cope* case, the Comptroller of the Currency, as an officer of the United States, was the principal charged with the duty of recovering and disbursing the assessment moneys. If it were important, the Comptroller would have undoubtedly accepted Respondents' payments in Washington. It is possible, too, that the Receiver would have sent a representative to Respondents' homes or places of business to accept payment. Respondents' imaginary difficulties on this subject should not be of importance here. The Court is considering not hypothetical situations or supposed facts, but where the cause of action asserted by the Petitioner arose. That cause of action is silent on the subject of payment. All Banco shareholders have been compelled to admit that the bill of complaint states a cause of action in its present language. Having no defense on the merits, they have been compelled to drag in, wholly by way of argument, as a crucial fact decisive of the jurisdiction in which the cause of action arose—failure to pay.

The English case, *Durham* v. *Spence*, L. R. Vol. 6 (1870-71) is cited for the proposition that the time when a cause of action arises also determines the place where it arises. There, the defendant challenged the validity of a writ served on him in Africa in a suit for breach of a marriage contract instituted against him in England. An English statute permitted such service either where a cause of action arose within the jurisdiction or where a breach of contract occurred within the jurisdiction. The contract was performable in England and the breach occurred there.

In addition to the language quoted by Respondents, the court said that the defendant could scarcely complain if he was sued for his default in the place where he said performance should be made.

In Petitioner's original Brief, the analogy was drawn between the cause of action against an endorser of a promissory note and that asserted against Respondents here (Br. p. 10). No comment is made by Respondents on that point or the authorities cited. Instead, Respondents say that the situation here is the same as if each Banco shareholder had executed a note to the bank payable in Louisville on April 1, 1931. It is said that upon the default in those notes, the resulting cause of action would arise in Louisville. Perfectly true. But not by reason of any default. The jurisdiction in which the cause of action arose was selected by the parties in their agreement making Louisville the place of performance. They agreed that the law of Kentucky would be controlling. In the situation supposed by Respondents, with Banco shareholders as makers of notes payable to the bank, the Receiver's cause of action against them would be identical with that of the bank's, and any defense good against the bank would be good against the Receiver. But Petitioner's claim here is not to collect an asset of the National Bank of Kentucky. His right against Respondents and the latter's liability to him is wholly distinct and separate from the bank. As originally suggested by Petitioner, suppose Banco negotiated a note to the National Bank of Kentucky, upon which Respondents' names appeared as endorsers and they had entered into their contract of endorsement in Ohio. The cause of action against them, whether asserted by the bank or its Receiver, would arise in Ohio because solely subject to its laws.

In support of the claim that the Comptroller or the Receiver had the power to "fix" the place of payment, reference is made to Section 191 of the National Bank Act which

says that the Receiver "shall proceed to . . . enforce the personal liability of shareholders." But the Receiver's March 1931 notice, at most a premature suggestion of the acceptability of money expected to be owing at a later date, could have no such effect as imposing a different kind of liability than that to which Respondents were already subject under the law. That could hardly be described as a proceeding to "enforce" the liability. *Wittnebel* v. *Loughman*, 9 F. Supp. 465 (D. C. N. Y. 1935) is cited for the principle that the Receiver's powers are to be liberally construed. The District Court there said that the National Bank Act should be liberally construed with reference to powers of the Comptroller and the receiver in order that expeditious and just winding up may be achieved. The court relied on *Korbly* v. *Springfield Institution for Savings*, 245 U. S. 330, where the liberal construction of the act was said to be for the purpose of promoting the closing up of the affairs "and paying the debts of such unfortunate institutions." The liberality was in the interests of the depositors and creditors, not those in the position of Respondents here. See *LaParr* v. *City of Rockford*, 100 F. (2d) 564 (C. C. A. 7; cert. den. 307 U. S. 624), where action of the Comptroller or receiver detrimental to the interests of depositors was held not to bind either. The action there was in excess of the legal powers of either the Comptroller or receiver.

Petitioner has not sought to avoid the effect of his notice by characterizing it as a mere "warning." The notice upon which Respondents base their defense had no effect. It was completely unnecessary. Its purpose was to avoid, if possible, the defense of election of remedies. This Court, in *Anderson* v. *Abbott*, indicated that there was no election regardless of that warning. The very case cited by Respondents, *Abell* v. *Anderson*, 148 F. (2d) 372 (C. C. A. 6, 1945), as have all other opinions interpreting that notice,

reached the same conclusion as to its meaning as Petitioner asserts here.

(c) "The Insolvency Occurred in Kentucky Where the Bank Was Domiciled and Transacted Its Business."

There is nothing in this subsection of Respondents' Brief in controversy except the conclusion that non-payment of the assessment in Louisville was an operative fact which gave rise to this cause of action. Where the bank did its business and where it failed is of no more importance in this case than inquiry into the reasons for its failure. This action is brought by an officer and agent of the United States on behalf of persons who were creditors of the bank. *Auten* v. *U. S. Nat. Bank*, 178 U. S. 125; *Oppenheimer* v. *Harriman Nat. Bank*, 301 U. S. 206; *Frank* v. *Giesy*, 117 F. (2d) 122, 126 (C. C. A. 9, 1941). If this were an action by the bank or by a receiver to enforce payment of some bank asset, on a private contract, then the place for performance or the place of execution or the place of breach might invite inquiry as to the state whose laws control those subjects. But the place where the bank failed or where it did business is as unimportant here as the place where or the reasons why a maker breaches his contract to pay a note, in a case where the liability is sought to be imposed upon one secondarily responsible.

Respondents find a striking analogy between the facts in *Hunter* v. *Niagara Fire Insurance Co.*, 73 O. S. 110, 76 N. E. 563 (1905). In that case not only was the insurance company at all times subject to suit in Florida, but the contract of insurance was applied for, signed and delivered in Florida. The cause of action arose in Florida because that was the lex loci contractus. Respondents' repeated reference to the word "ripened" again exhibits the erroneous conclusions reached by arguments premised upon the assumption that "time when" is synonymous with "place

where." The insurance case was a suit on an express contract. The rights and duties of the parties to that contract did not touch or concern federal law in any way. Here, as Respondents admit, "the liability was created by federal statute." In the *Hunter* case it is true that liability "ripened" by reason of the fire in Florida. It is also true that here the failure of the bank was an incident in ripening Respondents' liability. But the only law with which we are concerned here is the law of the country, not that of the state of Kentucky. *Forrest* v. *Jack*, 294 U. S. 158, 162; *Seabury* v. *Green*, 294 U. S. 165, 168. The state of Kentucky could no more trammel Petitioner's cause of action than did the law of the state of Delawafe. *Anderson* v. *Abbott*, 321 U. S. 349, 365.

Though the only issuable fact in Petitioner's bill of complaint was the Respondents' status with respect to the trustees' participation certificates held by Banco—that is, their ownership of property which fastened liability upon them—Respondents argue that the ownership of holding company stock "unaccompanied by insolvency of the bank and failure to pay an assessment, obviously cannot give rise to a cause of action." This is post hoc, ergo propter hoc *logic*. By the same process, it could be urged that but for the assessment, this litigation would not have resulted; but for Respondents' ownership of Banco stock, they would not be parties to this litigation. The mere execution and delivery of a promissory note does not give rise to a cause of action. The endorsement of a promissory note does not give rise to a cause of action. But if and when a cause of action does arise, it is the aggregate of the operative facts and not merely the incidents determining when the cause accrued, which are determinative.

In the *Vanston Bond Holder* case, *supra*, aside from the intervention of federal bankruptcy law, the place of business of the debtor and the location of the property pledged

to secure the bondholders' claims, all in Kentucky, had nothing to do with where the cause of action arose. It arose in New York and the right-duty relationship was controlled by New York law simply because that was the agreement.

DISCUSSION OF THE THIRD CIRCUIT DECISION

Respondents represent that the *Cope* case is distinguishable from this, as set forth in their brief opposing certiorari. Respondents contended that if any conflict between this case and the *Cope* case exists, it is merely a conflict as to state law. Until the Third Circuit Court of Appeals reversed the erroneous decision of the District Court, Respondents maintained that the question in the two cases was the same.

The basis of the Third Circuit's decision certainly was not that the Comptroller of the Currency was the real recipient of assessment collections. The comment made by the court on that subject merely ended a discussion of defendant's argument that the cause arose in Kentucky, described as "all right if it is said quickly without parsing it" (Cope Record, p. 62). The observation concerning the ultimate recipient of the funds concluded the court's parsing. The basis of the decision is that a federally created right is here sought to be enforced, a right as extensive in its reach as the laws of the country creating it.

Judge Goodrich said that Petitioner is seeking to enforce "rights arising out of transactions governed by the federal government acting within its constitutional field." This basis was described by the court as a wider ground requiring a reversal. That ground was not the "second" at all.

Respondents profess doubt as to the meaning of the opinion of the Third Circuit in the *Cope* case, suggesting that, it if was meant "that the local law of limitations is

not applicable to the action, the decision is clearly incorrect." There is utterly no basis for such doubt. The court held the local law of limitations was applicable. It refused to apply the foreign law of the state of Kentucky.

The whole fallacy of Respondents' position is highlighted by the contention "that in determining the place where a cause of action arises the law by which the liability was created is of no materiality." If it is not the law, then it is wholly a matter of geography, a conception which is not permissible.

Holmberg v. *Armbrecht* is distinguished because there the right was a federal equitable right, while here the right is legal, though asserted on the equity side of the court. That case is said to have involved only the preliminary question presented here—whether any state statute of limitations was applicable. On this preliminary question, Respondents state at page 23 of their Brief, "There is no dispute in the instant case." The first point in Respondents' summary is devoted to convincing the Court that the limitations law of the forum applies.

A comment on the *Cope* and *Helmers* cases in 60 Har. L. R. 303 does criticize the former, for no convincing reason. The author suggests that a more reasonable result has been reached in cases applying the borrowing statutes to suits under the federal antitrust laws and holding that a cause of action originates in the particular state where the principal operative facts of the harm occurred. One of the reasons the result in the federal antitrust cases is reasonable is the fact that the person damaged has an opportunity of seeking redress either at the place he suffers those damages or where the tort feasor resides. That situation does not obtain here. Petitioner was required by federal law to sue Respondents in Ohio. Had he been able to sue them in Kentucky, they would have been defendants in *Anderson* v. *Abbott*.

CONCLUSION

It must be conceded that the claim upon which suit was brought arose under and by virtue of the laws of the United States. Respondents' obligation matured to an enforcible right upon the quasi-judicial determination of an officer of the United States.

The "laws" of the United States did not "limit the time" for commencing suit to a lesser number of years than that provided by the Ohio general statute of limitations, so only the latter controls. The conditional "if" of the borrowing statute has not been met because the laws of Kentucky had nothing whatever to do with the arising of the cause. If federal statutes prescribed a shorter period of limitations, applicable to statutory claims generally, the procedural law of the forum would appropriately borrow such period. But there is no justification for the adoption of the procedural law of a third jurisdiction, Kentucky, which is neither the forum nor the political entity whose laws caused the action to arise.

Respondents assert that the cause of action arose in Kentucky because they were legally bound to regard the assessment as payable there. The National Bank Act fixes no place for payment. The Comptroller made no attempt to fix a place for payment. The original Receiver did not even invite Banco shareholders to pay any amount, at any time, or at any place. He merely advised them that satisfaction would be sought from them for whatever amount Banco did not pay.

Petitioner's cause of action is the aggregate of the facts necessary to establish his right to recovery under federal law. But for the lapse of time from February 20th to April 1st, that aggregate of facts had taken place when the assessment was ordered. Respondents' only connection with these facts was their acquisition of holding company stock. There-

after, the only conduct on their part which could have affected the cause of action would have been their parting with that stock before the bank closed.

Petitioner's cause of action had arisen when the assessment was levied. Postponing his right to sue added nothing to what had already occurred. Had the Comptroller not restrained the right of action, it could not be denied that the Receiver was possessed of both a completed cause of action and a presently enforcible right of action as of the moment the assessment was ordered. Such grace periods are not something to which shareholders are entitled as a matter of right. The Comptroller's concession in this regard could hardly have the effect of changing a cause of action in which the process of "arising" was then ended.

Respondents' motion to dismiss is based upon the assumption that the cause of action asserted here is not that alleged in the bill of complaint, but an action for breach of a legal obligation arising in Louisville, Kentucky, because of their failure to pay there.

It is respectively submitted that the judgment below should be reversed.

Respectfully submitted,

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